No. 13938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK KALPAKOFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on November 19, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On December 8, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on February 9, 1953.

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[1]"R." refers to "Transcript of Record."

On March 26, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a jury, and on March 26, 1953, the appellant was found guilty as charged in the Indictment. [R. p. 26.]

On April 7, 1953, the appellant was sentenced to imprisonment for a period of four years and judgment was so entered. [R. pp. 4-5.] Appellant appeals from this judgment. [R. pp. 6-7.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Section 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution

of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 22575-CD Criminal [U. S. C., Title 50, App., Sec. 462—Universal Military Training and Service Act.]

"The grand jury charges

"Defendant Jack Kalpakoff, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 85, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 28, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regula-

tions promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On December 8, 1952, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of not guilty to the offense charged in the Indictment.

On February 9, 1953, the case was called for trial before the Honorable William C. Mathes, without a jury, and J. B. Tietz, Esq., represented the defendant-appellant. On March 26, 1953, appellant was found guilty as charged in the Indictment. [R. p. 26.]

On April 7, 1953, the appellant was sentenced to imprisonment for a period of four years in a penitentiary. [R. pp. 4-5.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in not concluding that there was a failure of proof that a valid order to report had been issued. [App. Spec. of Error 1, App. Br. p. 4b.][2]

B. The District Court erred in not concluding that appellant had been denied due process of law in connection with his hearing before the Hearing Officer of the Department of Justice. [App. Spec. of Error 2, App. Br. p. 4b.]

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

C. The District Court erred in not concluding that the final classification of appellant was without basis in fact. [App. Spec. of Error 3, App. Br. p. 4b.]

D. The District Court erred in refusing appellant permission during trial to use the F.B.I. reports to impeach the honesty of the Hearing Officer's recommendation. [App. Spec. of Error 4, App. Br. p. 4b.]

IV.

STATEMENT OF THE FACTS.

On September 14, 1948, Jack Kalpakoff registered under the Selective Service system with Local Board No. 85, Pasadena, California. He was nineteen years of age at the time, having been born on February 12, 1929. He gave his occupation as "Farmer" and indicated that his farm was in Lancaster, California. [F. 1.][3]

On October 18, 1948, the appellant filed with Local Board No. 85, SSS Form 100, Classification Questionnaire. [F. 4-12.]

On November 4, 1948, the appellant was classified in Class I-A and was mailed SSS Form 110, Notice of Classification, on the same date.

On November 12, 1948, the appellant filed a letter of appeal for a reclassification. [F. 13-14.]

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[3]Numbers preceded by "F." appearing herein within brackets refer to pages of appellant's draft board file, Government's Exhibit No. 1, a file of photostatic copies of papers filed in the cover sheet of appellant's draft board file. At the bottom of each page thereof appears an encircled handwritten number which identifies the pages in the draft board file.

On October 3, 1950, SSS Form 223 was mailed to the appellant, ordering him to report for a pre-induction physical examination, but this order was cancelled on October 5, 1950, because the appellant was reclassified in Class III-A until April 5, 1951. [F. 3, 11.]

On October 9, 1950, SSS Form 110, Notice of Classification, was mailed to the appellant.

On March 26, 1951, the appellant called at the Board and was handed SSS Form 150, Special Form for Conscientious Objector. This form was filed with the Local Board on March 30, 1951. [F. 11, 20-23.]

On April 5, 1951, the appellant was classified in Class I-A, and was mailed SSS Form 110, Notice of Classification, on April 6, 1951.

On April 16, 1951, the appellant filed notice of appeal from this classification. [F. 11, 25.]

On May 28, 1951, SSS Form 223, Order to Report for Armed Forces Physical Examination, was mailed to appellant to report for physical examination on June 8, 1951. [F. 11, 26.]

On June 18, 1951, NME Form 62 mailed to appellant. He was found acceptable for induction into the armed services. [F. 11, 27.]

On June 21, 1951, the cover sheet and contents of the appellant's file was forwarded to the Appeal Board. On June 25, 1951, the Appeal Board reviewed the file and determined that the registrant is not entitled to classification in either a class lower than IV-E or in Class IV. [F. 11, 38.]

On March 25, 1952, the appellant personally appeared at the hearing in response to the notice mailed to him,

before Nathan O. Freedman, Hearing Officer. [F. 42-44.] The Hearing Officer recommended that, based on the appellant's testimony, he should be classified in Class I-A. [F. 44.]

On April 24, 1952, the Department of Justice, after examination and review of the entire file and record, recommended to the Board that the registrant be not classified as a conscientious objector. [F. 40.]

On May 7, 1952, appellant was classified in Class I-A by the Appeal Board and Form 110, Notice of Classification, was mailed to the appellant. [F. 11.] On May 19, 1952, a letter from the appellant was received, appealing his classification given by the Appeal Board. [F. 11, 45.] On the same date, a letter was sent to the appellant advising him that he had no further right of appeal. [F. 11, 46.]

On May 27, 1952, SSS Form 252, Order to Report for Induction, was mailed to appellant, ordering him to report for induction on June 10, 1952. [F. 11, 51.]

On June 9, 1952, SSS Form 264, Postponement of Induction, was mailed to appellant, Jack Kalpakoff, by authority of the Director of Selective Service under SSS Regulation 1632.2. [F. 11, 55.] The induction was postponed by authority of the Director of Selective Service so that the file could be forwarded to Selective Service Headquarters. [F. 11, 55-57.]

On July 15, 1952, the complete file and cover sheet were returned from California Headquarters, Selective Service System. The information in the file was considered and no action was taken inasmuch as the facts presented did not warrant the reopening or reclassification of the appellant. [F. 11, 65-66.]

On July 16, 1952, the appellant was directed by letter to report for induction on July 28, 1952, inasmuch as reason for postponement of original induction scheduled for June 10, 1952, no longer existed. [F. 11, 67.]

On July 28, 1952, the registrant failed to appear for induction as ordered. [F. 11.] On August 1, 1952, Local Board No. 85 received a letter from the appellant, stating that he could not appear for induction into the Army. [F. 74.] On August 14, 1952, the registrant was declared a delinquent. [F. 12, 75.]

V.

ARGUMENT.

POINT ONE.

The Order to Report for Induction Was Valid.

The controlling Section, in the event of a postponement of induction, is Section 1632.2 of the Selective Service Regulations (32 C. F. R., Sec. 1632.2, Postponement of Induction), which is as follows:

* * * * * * * *

> "(b) The local board shall issue to each registrant whose induction is postponed a Postponement of Induction (SSS Form No. 264), shall mail a copy of such form to the State Director of Selective Service, and shall note the date of the granting of the postponement and the date of its expiration in the 'Remarks' column of the Classification Record (SSS Form No. 102).
>
> "(c) Any period of postponement authorized in paragraph (a) of this section may be terminated before the date of its expiration when the issuing authority so directs and the registrant shall then report for induction at such time and place as may be fixed by the local board.

"(d) A postponement of induction shall not render invalid the Order to Report for Induction (SSS Form No. 252) which has been issued to the registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new Order to Report for Induction (SSS Form No. 252)."

The Regulations set out, in certain and specific language, the procedure for ordering registrants to report for induction and, in the event of postponement of induction. Section 1632.2 provides that the Director of Selective Service, or any State Director of Selective Service may, for good cause, after the issuance of an order to report for induction, postpone the induction of the registrant until such time as he may deem advisable, and no registrant whose induction has been thus postponed shall be inducted into the Armed Forces during the period of such postponement. The procedure for the Local Board to follow is in subsection (b), wherein the Local Board is directed to issue to each registrant whose induction is postponed, a Postponement of Induction (SSS Form 264). Subsections (c) and (d) of Section 1632.2 indicate the method of terminating the postponement of induction. No specific form is designated for the termination of the period of postponement. Subsection (d), however, states that a postponement of induction shall not render invalid the Order to Report for Induction, but operates only to postpone reporting date, and the registrant shall report on the new date without having issued to him a new Order to Report for Induction (SSS Form 252). These requirements, it is submitted, have been complied with by the Local Board and thus the Order to Report for Induction was a valid one.

POINT TWO.

There Was No Denial of Due Process Upon the Personal Appearance of the Appellant Before the Hearing Officer of the Department of Justice.

The statute granting the exemption reads as follows:

> *"Title 50, App., United States Code, §456. Deferments and exemptions from training and service.*
>
> * * * * * * * *
>
> "(j) Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is necessary, however, for a person who claims exemption from combatant or noncombatant training, to have his claim sustained by the Selective Service System. Thus, a registrant who desires a conscientious objection exemption must satisfy the Selective Service System as to the validity of his claim for exemption in the following particulars: (1) he must be conscientiously opposed to war in any form; (2) this opposition must be by reason of the registrant's religious belief, and (3) his religious training; (4) in addition, the character of the registrant, and (5) the good faith and sincerity of his objections are judged.

To determine the conscientious objections and the validity thereof, the registrant is given a hearing before a Hearing Officer of the Department of Justice. As this

time, the Hearing Officer is able to observe the demeanor of the registrant, test his good faith and the sincerity of his conscientious objection claims, and allow the registrant to be heard in regard to his conscientious objector claims. *United States v. Nugent,* 346 U. S. 1.

It is submitted that conscientious objection is an intangible thing, and as such it is difficult to determine whether or not a registrant is a conscientious objector. The Hearing Officer was able to review the registrant's file prior to the time of the hearing and was able to converse with him in regard to his claims. The statements of facts in Government's Exhibit No. 1 (pp. 43 and 44) indicate that this occurred: the Hearing Officer concluded that the registrant is not a conscientious objector, basing his conclusions on the entire Selective Service file, his observations of the registrant, and the facts as stated in his conclusions.

Taken in this light, the Hearing Officer's recommendation has basis in fact and is a valid one.

In answer to appellant's third point on page 15 of the Appellant's Brief, see *infra,* the discussion under Point Four.

POINT THREE.

The Classification of Appellant in Class I-A Was With Basis in Fact and Not Arbitrary.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court said:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord:

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemption and deferment from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85 (9th Cir.).

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is upon a registrant to establish his eligibility for deferment, or exemption, to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir).;

Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is considered to be available for military service.

32 C. F. R., Sec. 1622.1(c);

United States v. Schoebel, supra.

Every registrant who has failed to establish to the satisfaction of the local board that he is eligible for classification in another class is placed in Class I-A.

32 C. F. R., Sec. 1622.10.

The Local Board carefully considered the claim of the appellant for exemption. In fact, the Board did grant the appellant a III-A classification for six months by reason of his farming activities. [F. 11, 46, 52.] The classification of the Local Board, and thereafter of the Appeal Board, is final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114, at pages 122-123, stated in this regard:

> ". . . The provision making the decision of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Accord:

Martin v. United States, 190 F. 2d 755 (4th Cir.), *cert. den.* 342 U. S. 872.

POINT FOUR.

The District Court Did Not Err in Refusing to Allow the Investigative Report of the Federal Bureau of Investigation to Be Introduced Into Evidence.

United States v. Nugent, supra, appears to be a controlling case in this regard. The Court held that such a procedure as occurred in this case was constitutional. It stated that the statutory scheme for review of exemptions claimed by the conscientious objectors does not entitle them to have the investigator's report reproduced for their inspection, on pages 5 and 6 of the Opinion. It appears that the Hearing Officer complied with the requirements as set forth by the *Nugent* case in regard to giving the adverse evidence, if any, to the registrant that may have been contained in the Federal Bureau of Investigation report. [R. pp. 20-21.]

The Court made an *in camera* examination of the documents before ruling on the motion of the defendant for the admission of the investigation report into evidence. The Court held that the report of the Federal Bureau of Investigation as to the conscientious objection claims of the defendant is irrelevant and immaterial. Accordingly, the documents were not entered into evidence. [R. p. 24.] It is within the power of the trial court to exclude irrelevant, immaterial and incompetent evidence. Procedural irregularities or admissions which do not result in prejudice to the appellant are to be disregarded. *Martin v. United States,* 190 F. 2d 775; *Atkins v. United States,* 204 F. 2d 269.

VI.
CONCLUSION.

The appellant was indicted for failure to report on a valid order to report for induction.

There was no denial of due process of law in connection with the hearing before the Hearing Officer of the Department of Justice.

The classification of appellant in Class I-A was with basis of fact and not arbitrary.

The trial court committed no error when it refused to receive into evidence the Federal Bureau of Investigation report and excluded it from inspection and use by the appellant in the trial of this case.

There was no error of law in the rulings of the trial court and therefore, the conviction should be affirmed.

Respectfully submitted,

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